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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Glenn)**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LARRY EDWARD HILLER,<br><br>Defendant and Appellant. | C041025<br><br>(Super. Ct. No. 01SCR4740) |

Following the trial court's denial of his pretrial motion for a hearing as to his suitability for a drug diversion program (Pen. Code, § 1000 et seq.),[1] defendant Larry Edward Hiller was

[1] For ease of expression, we adopt defendant's characterization of Penal Code section 1000 as establishing a "diversion" program for first-time drug offenders. However, the characterization is somewhat inaccurate because the statute now requires that such a defendant plead guilty before his entry into the drug treatment program and merely defers entry of judgment pending successful completion of the program. (See Pen. Code, §§ 1000, subds. (b), (c) & (d), 1000.1, subds. (a)(1), (b) & (d); Stats. 1996, ch. 1132, § 2.)

tried by the court and convicted of cultivating marijuana in violation of section 11358 of the Health and Safety Code.

Granted probation, defendant appeals, contending that (1) his motion for a diversion eligibility hearing was erroneously denied, and (2) his waiver of his right to a jury trial was ineffective. We find that defendant was entitled to an eligibility hearing pursuant to our decision in *People v. Williamson* (1982) 137 Cal.App.3d 419 (*Williamson*), but we disagree that his waiver of his right to a jury trial was ineffective.

With respect to the jury trial waiver, the defendant, defense counsel, and the prosecution all expressly consented to the waiver of the right to a jury trial in open court in accordance with the California Constitution. (Cal. Const., art. I, § 16.) While the trial court should have engaged in a more searching inquiry to assure a knowing and voluntary waiver, "the cases do not require a specific formula or extensive questioning beyond assuring that the waiver is personal, voluntary and intelligent." (*People v. Castaneda* (1975) 52 Cal.App.3d 334, 344.) Although defendant now contends that the record does not disclose that his waiver was knowing, it would promote ritualistic incantations over common sense to hold that an educated, 50-year-old native Californian and U.S. citizen, represented by able counsel, did not knowingly and voluntarily waive his right to a jury trial when he expressly did so in open court in the manner required by the California Constitution

(Cal. Const., art. I, § 16), without any evidence of coercion, and pursuant to his own counsel's motion to waive a jury trial.

Accordingly, we reject defendant's claim that his jury waiver was ineffective, but we shall nonetheless reverse the judgment pursuant to our decision in *Williamson* in order to permit the trial court to determine whether defendant is eligible for the drug diversion program.

**FACTUAL AND PROCEDURAL BACKGROUND**

Pursuant to a search warrant, officers found 64 living marijuana plants, 29 dead plants, and various cultivation materials and devices on property owned by defendant and codefendant Ernest Ceccon. Four of the living plants were over four feet tall; the rest were about six to ten inches tall and growing in styrofoam cups.

As the search warrant was being executed, defendant and his codefendant Ceccon appeared on the property and were arrested. Defendant admitted owning the property, but otherwise refused to speak to officers. In contrast, Ceccon admitted that he and defendant were growing marijuana on the property, but claimed that it was for their personal use. Ceccon also signed the following written statement: "We were growing these plants for personal use only[;] none was to be sold. We had several small plants started but expected to only end up with a few by the end of season. I own this property jointly with [defendant] Larry Hiller. We cared for the plants together. The seeds were started under lights in small cups[,] then put outside to get

[accli]mated[,] then planted. Some small plants were from cuttings from the larger plants. There were approximately 30 small plants and 4 larger plants. We've been growing a few plants for our use for the past 3 or 4 years."

Thereafter, a warrant was issued to search defendant's *residence*. There, officers found a few live marijuana plants; loose marijuana was visible on tables and floors. In one bedroom, officers found a clear plastic baggie containing a green leafy material believed to be marijuana, several additional plastic baggies, several firearms, and a small note pad with notations, which officers believed to constitute pay/owe sheets. The garage contained what officers described as "a large amount" of marijuana. And there were marijuana plants and loose marijuana on a table in the backyard.

Defendant was charged with cultivating marijuana in violation of section 11358 of the Health and Safety Code. Following a court trial based on the police reports and other documentary evidence, defendant was convicted as charged.

We shall supplement the facts as necessary for our discussion of defendant's contentions.

## DISCUSSION

### I. The Record Is Sufficient to Establish That Defendant's Waiver Was Knowing and Intelligent

Defendant first contends that his purported waiver of a jury trial was ineffective because the record "affords no

reliable indication that [he] understood his inalienable constitutional right to trial by jury and agreed to give it up."

### *A. Defendant's Purported Waiver*

The relevant portion of the record reflects the following exchange concerning defendant's waiver of his right to a jury trial:

"The Court: Next in the matter of Hiller, Larry Hiller SCR4740. Mr. Davis [counsel for defendant] appearing; Mr. Hiller is present; Mr. Holzapfel on behalf of the People. There is a motion, Mr. Davis, by you to vacate the request for a jury trial and ask the matter be set for a Court trial?

"Mr. Davis: That's correct, your Honor.

"The Court: And, Mr. Hiller, you join in that request?

"The Defendant: Yes, sir.

"The Court: The jury trial is currently vacated. The matter will be set for court trial on February 13th at 8:30. That will be in Willows. Mr. Holzapfel, the People also waive jury?

"Mr. Holzapfel: People also waive jury, your Honor.

"The Court: And Mr. Hiller -- Is he on bail or O.R.?

"The Defendant: Bail.

"The Court: Bail; that will continue. I'll see you February 13th at 8:30.

"The Defendant: Okay; thank you.

"Mr. Davis: Thank you, your Honor.

"The Court: That's the order; trial's vacated."

Defendant argues that this record is inadequate to show "that the superior court expressly advised [defendant] of his constitutional right to try this case to a jury, or that [he] expressly waived that right."

The People respond that "[t]he above record . . . makes it . . . clear that [defendant's] waiver of a jury trial was expressed in open court, by the consent of both parties, as required under the California Constitution, article I, section [16]."

***B. Analysis***

A defendant in a criminal prosecution has a right to a trial by jury under both the federal Constitution and our state Constitution. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; see also *Duncan v. Louisiana* (1968) 391 U.S. 145 [20 L.Ed.2d 491]; *People v. Ernst* (1994) 8 Cal.4th 441, 444-445, 447.)[2]

Under the California Constitution, the defendant and the prosecution may waive the right to a jury in a criminal case and elect a court trial, but the Constitution specifies the

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[2] A defendant is not prevented from raising on appeal for the first time the denial of a fundamental constitutional right, such as the denial of a jury trial. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444.)

exclusive manner for doing so: "A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel." (Cal. Const., art. I, § 16.) As suggested by the language of the constitutional provision, this waiver must be express and not implied from defendant's conduct. (*People v. Ernst, supra,* 8 Cal.4th at pp. 445, 448; *People v. Holmes, supra*, 54 Cal.2d 442.)

However, because both the federal and state constitutional right of trial by jury in a criminal cause is "fundamental" (*People v. Collins* (2001) 26 Cal.4th 297, 304 (*Collins*)), the mere expression of consent is not sufficient to effectuate the waiver. As our state Supreme Court recently ruled in *Collins*: "As with the waiver required of several other constitutional rights that long have been recognized as fundamental, a defendant's waiver of the right to jury trial may not be accepted by the court unless it is knowing and intelligent, that is, '"'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it,'"' as well as voluntary '"'in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.'"' [Citation.]" (*Id.* at p. 305.) And it is settled under federal and state law that the waiver of fundamental constitutional rights requires "an *affirmative showing* that it was intelligent and voluntary." (*Boykin v. Alabama* (1969) 395 U.S. 238, 242-244 [23 L.Ed.2d 274,

279-280], italics added.) The courts may not "presume a waiver . . . from a silent record." (*Id.* at pp. 243-244 [23 L.Ed.2d at pp. 279-280], fn. omitted.)

Nonetheless, "[i]n determining whether there has been an effective waiver of a jury trial in favor of a court trial, the cases do not require a specific formula or extensive questioning beyond assuring that the waiver is personal, voluntary and intelligent. [Citations.]" (*People v. Castaneda, supra,* 52 Cal.App.3d at p. 344; accord, *People v. Wrest* (1992) 3 Cal.4th 1088, 1103.)

Further, it is settled in California that "'[t]he law . . . does not impose on the trial court an obligation to explore a defendant's reasons for giving up the right to a jury.'" (*People v. Scott* (1997) 15 Cal.4th 1188, 1209, quoting *People v. Diaz* (1992) 3 Cal.4th 495, 571.) And "[t]here is no constitutional requirement that [a defendant] understand 'all the ins and outs' of a jury trial in order to waive his right to one." (*People v. Wrest*, *supra*, 3 Cal.4th at p. 1105.)

However, no case of which we are aware specifies the minimum that the record must contain in order to warrant a finding that the defendant's waiver of the right to a jury trial is knowing and intelligent, that is, that it was made with a full awareness of the nature of the right and the consequences of the decision to abandon it.

We thus survey the cases. Numerous cases have *recommended* that courts inform defendants that 12 members of the community

compose a jury, that the defendant may take part in jury selection, that the jury verdicts must be unanimous, and that the court alone will decide guilt or innocence if a jury trial is waived. (E.g., *United States v. Cochran* (9th Cir. 1985) 770 F.2d 850, 853; *United States v. Martin* (6th Cir. 1983) 704 F.2d 267, 273; *United States v. Wandick* (7th Cir. 1989) 869 F.2d 1084, 1088.) But these cases have also *held* that personal knowledge of each of these rights, and particularly "the right to participate in the selection of jurors and the right to be convicted only upon a substantial majority vote of the jury[,] is not constitutionally required for a knowing and intelligent jury waiver." (*United States v. Wandick*, *supra*, at p. 1088; accord, *United States v. Martin*, *supra*, at p. 274; *United States v. Cochran*, *supra*, at p. 852.)

Instead, several California courts have upheld, as knowing and intelligent, the defendant's waiver of his right to a jury trial where the record only showed that he was advised that "if he opted for a jury, he would have '12 jurors who must unanimously agree'" on guilt. (*People v. Diaz, supra,* 3 Cal.4th at pp. 570-571; *People v. Wrest, supra,* 3 Cal.4th at pp. 1103-1105.)[3]

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[3] Not surprisingly, such an advisement by the court, combined with a representation by counsel that the nature of the right has been discussed with defendant, has also been held sufficient. (*People v. Castaneda, supra,* 52 Cal.App.3d at pp. 343-345; see *People v. Miller* (1972) 7 Cal.3d 562, 567;

***(CONTINUED.)***

At least one California case found an effective waiver following the mere admonition that defendant was entitled to a jury of 12 people to determine the matter. (*People v. Rodriguez* (1969) 275 Cal.App.2d 946, 950-951.) And a federal court came to the same conclusion. (*United States v. Wandick*, *supra*, 869 F.2d at p. 1087.)

Further descending down the scale of admonitions, a mere inquiry whether defendant was willing to waive his right to a jury trial and have the case tried by the court has been deemed sufficient where accompanied by the written waiver required by the Federal Rules of Criminal Procedure. (*United States v. Martin, supra,* 704 F.2d at p. 270.)

And in some California cases, counsel's bare representation in open court that he had *explained* to defendant his right to a jury trial, and defendant's express waiver of that right, without any admonition by the court, has been deemed sufficient to demonstrate an effective waiver. (*People v. Evanson* (1968) 265 Cal.App.2d 698, 700-701; *People v. Acosta* (1971) 18 Cal.App.3d 895.)

Finally, a number of federal cases have held that defendant's mere *representation* by counsel was sufficient to demonstrate an effective waiver of the right to jury trial,

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*People v. Lookadoo* (1967) 66 Cal.2d 307, 311-314; *People v. Wrest, supra,* 3 Cal.4th at pp. 1103-1104.)

despite the trial court's failure to interrogate the defendant as to his understanding of his waiver, where the defendant signed a written waiver of the right to jury trial (as required by the Federal Rules of Criminal Procedure). (*United States v. Cochran, supra,* 770 F.2d 850; *United States v. Straite* (D.C. Cir. 1970) 425 F.2d 594; *United States v. Hunt* (4th Cir. 1969) 413 F.2d 983; see also, *United States v. Gordon* (5th Cir. 1983) 712 F.2d 110, 115.) On the other hand, where the record suggested that the defendant suffered from a mental disorder or a language barrier and the court failed to engage in a colloquy that reasonably assured the court that the waiver was made voluntarily and knowingly, the courts have held the waiver ineffective. (E.g., *United States v. Christensen* (1994) 18 F.3d 822, 825-826; *United States v. Duarte-Higareda* (1997) 113 F.3d 1000, 1003.)

In this case, defendant was a 50-year-old U.S. citizen, who was born in California, had graduated high school, and had attended two years of community college. In response to defense counsel's motion to vacate defendant's request for a jury trial, the trial court directly inquired whether defendant joined in that request, and the defendant expressly did so in open court in the manner required by the California Constitution. (Cal. Const., art. I, § 16.)

Applying the surveyed case law to the facts of this case, the cases clearly do not require defendant to "understand 'all the ins and outs' of a jury trial in order to waive his right to

one." (*People v. Wrest, supra,* 3 Cal.4th at p. 1105.) It is also clear under federal and California law that "personal knowledge of the right to participate in the selection of jurors and the right to be convicted only upon a substantial majority vote of the jury is not constitutionally required for a knowing and intelligent jury waiver." (E.g., *United States v. Wandick, supra,* 869 F.2d at p. 1088; accord, *People v. Rodriguez, supra,* 275 Cal.App.2d at pp. 950-951.) Thus, of the admonitions recommended by the courts, that leaves the advisements that a jury consists of 12 members of the community and that a defendant's waiver of his right to a jury will result in the court deciding the defendant's guilt or innocence. (E.g., *United States v. Cochran, supra,* 770 F.2d at p. 853.) If the record affirmatively supports defendant's awareness of those facts, we can conclude that defendant was aware of the nature of his right to a jury trial (i.e., that a jury consists of 12 members of the community who will pass judgment on the charges against defendant) and of the consequences of his abandoning it (i.e., that the court will decide the defendant's guilt or innocence if the right is waived), both of which must be shown for the waiver to be knowing and intelligent. (*Collins, supra,* 26 Cal.4th at p. 305.)

In this case, it would promote ritualistic incantations over common sense to conclude that an educated, 50-year-old American, who waives a jury in open court pursuant to his counsel's motion, was not aware that a jury in a felony case

generally consists of a dozen members of the community who will pass judgment on the charges against him and that the court will instead decide his guilt or innocence if he waives the right to a jury trial. From the O. J. Simpson trial to the numerous courtroom dramas on film and television -- from *Perry Mason* to *LA Law* -- a 50-year-old Californian would have to have hermetically sealed himself off from our culture to be unaware that a jury in a felony criminal case is normally composed of 12 members of the community or that a waiver of the right to a jury means that the court will make that decision.[4] Nothing in the record suggests that the defendant had any mental or cultural limitations that would have impeded his understanding of a concept as American as apple pie.

Moreover, absent any claim of ineffective assistance of counsel, the fact that defendant waived his right to a jury trial in accordance with his counsel's motion to waive jury also affirmatively suggests that defendant's waiver was knowing and voluntary. (*United States v. DeRobertis* (7th Cir. 1983) 715 F.2d 1174, 1182; see also *In re Tahl* (1969) 1 Cal.3d 122,

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[4] It is of no import whether the defendant knew that a jury in a California criminal cause is composed of exactly 12 jurors since knowledge of the nature of the right does not depend upon knowledge of the exact number. Indeed, the federal constitutional guarantee of trial by jury does not require 12 jurors (*Williams v. Florida* (1970) 399 U.S. 78 [26 L.Ed.2d 446]), and in state misdemeanor cases, a lesser number of jurors can be agreed upon (Cal. Const., art. I, § 16).

129, limited on other grounds in *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 302-311.) After all, "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 465 [82 L.Ed. 1461, 1467].) As a matter of state law, "[i]f an accused has counsel, courts have generally assumed, in the absence of evidence to the contrary, counsel will perform his duty as an advocate and an officer of the court to inform the accused of and take steps to protect the other rights afforded by the law . . . ." (*In re Tahl*, *supra*, 1 Cal.3d at p. 129.) Thus, absent a claim of ineffective assistance of counsel, defendant's representation by counsel and his jury waiver in the context of his counsel's motion to waive a jury provides a presumption that defendant's waiver is knowing and intelligent. Nothing in the record rebuts that presumption here.[5]

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[5] We note that the above-referenced quotation from *In re Tahl, supra,* 1 Cal.3d 122, was made in the context of a waiver of a defendant's constitutional rights in connection with a guilty plea *under state law*. *Tahl* went on to interpret the United States Supreme Court's decision in *Boykin v. Alabama, supra,* 395 U.S. 238 [23 L.Ed.2d 274] so as to require, *as a matter of federal law*, an enumeration of, and waiver of, the rights against self-incrimination, to confrontation, and to a jury trial, prior to the acceptance of a guilty plea. But our state high court subsequently determined that such an interpretation of federal law was erroneous and that the record need only affirmatively demonstrate that the plea was voluntary and intelligent under the totality of the circumstances. (*People v.*

***(CONTINUED.)***

Finally, we find additional support for our conclusion that defendant's waiver was effective by virtue of those cases addressing the validity of a guilty plea, which presupposes a voluntary and intelligent waiver of the defendant's constitutional trial rights, including the right to trial by jury. (See *People v. Howard, supra,* 1 Cal.4th at p. 1175.) As a matter of state law, a court must give explicit admonitions of the rights being waived (the rights to trial by jury, to confrontation, and against self-incrimination) by reason of a plea -- although the plea need not be reversed in the absence of the enumeration of each of those rights as long as the record affirmatively demonstrates that the plea was voluntary and intelligent under the totality of the circumstances. (*Id.* at pp. 1177-1179.) Since the bare enumeration of these rights and their waiver has been deemed sufficient to validate a guilty plea -- at least where the defendant "was actively represented by counsel and preparing for trial on charges to which he had pled not guilty" (*id.* at p. 1180; see *In re Tahl, supra,* 1

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*Howard* (1992) 1 Cal.4th 1132, 1177-1178.) In light of the absence of a constitutional requirement that trial rights be enumerated before a guilty plea is entered in order to make it effective, *Tahl*'s reference to the presumed role of counsel in informing the accused of his rights is relevant here: Representation by counsel suggests that a waiver of a single constitutional right is knowing and intelligent, no less than it suggests that a waiver of three constitutional rights (the rights of trial by jury, to confrontation, and against self-incrimination) is knowing and intelligent in connection with a guilty plea.

Cal.3d at p. 132) -- we see no reason why the enumeration of the lone right to a jury trial and its express waiver in open court pursuant to the requirements of the California Constitution should be insufficient -- at least where the defendant was actively represented by counsel and preparing for trial.

Accordingly, while the better practice is for trial courts to give the defendant a full set of admonitions on the components of the right to a jury trial so that the record unquestionably shows a knowing and intelligent waiver, we conclude that an educated, 50-year-old native Californian and U.S. citizen, who is represented by counsel, knowingly and intelligently waives his right to a jury trial where he does so in the manner provided by the California Constitution (art. I, § 16) and in accordance with his counsel's motion to waive a jury.

## II. The Court Should Have Conducted a Hearing to Determine Defendant's Eligibility for Diversion

Defendant also contends that the trial court abused its discretion by refusing a pretrial hearing to determine whether he was eligible for diversion pursuant to our decision in *Williamson, supra,* 137 Cal.App.3d 419. We agree.

Penal Code sections 1000 through 1000.4 "authorize the courts to 'divert' from the normal criminal process persons who are formally charged with first-time possession of drugs . . . and are found to be suitable for treatment and rehabilitation at the local level. The purpose of such legislation . . . is two-

fold. First, diversion permits the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction. Second, reliance on this quick and inexpensive method of disposition, when appropriate, reduces the clogging of the criminal justice system by drug abuse prosecutions and thus enables the courts to devote their limited time and resources to cases requiring full criminal processing." (*People v. Superior Court* (*On Tai Ho*) (1974) 11 Cal.3d 59, 61-62, fn. omitted.)

Under diversion (as it operates under the current statutory scheme), "[n]ot only are criminal proceedings suspended, but 'the accused is required to enter a guilty plea, and formal judgment is deferred.' [Citations.] If diversion is successfully completed, the charges are dismissed and the defendant is spared 'the stigma of a criminal record.' [Citations.]" (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 690.)

Penal Code section 1000 sets forth two general criteria for eligibility for diversion: First, the offense must come within an enumerated list of drug offenses -- one of which is the offense here, a violation of Section 11358 of the Health and Safety Code, but only "if the marijuana planted, cultivated, harvested, dried, or processed is for personal use" (Pen. Code,

§ 1000, subd. (a)) -- and second, the district attorney must determine from his or her file that the defendant meets the conditions set forth in subdivisions (a)(1) to (a)(6) of Penal Code section 1000, which include that the defendant has no prior conviction for any offense involving controlled substances, that the offense charged did not involve a crime of violence or threatened violence, and that there is no evidence of a violation relating to narcotics or restricted dangerous drugs other than one of the offenses on the enumerated list.[6]

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[6] Penal Code section 1000 provides in relevant part: "(a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for a violation of . . . Section 11358 of the Health and Safety Code if the marijuana planted, cultivated, harvested, dried, or processed is for personal use, . . . and it appears to the prosecuting attorney that . . . all of the following apply to the defendant: [¶] (1) The defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged offense. [¶] (2) The offense charged did not involve a crime of violence or threatened violence. [¶] (3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision. [¶] (4) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed. [¶] (5) The defendant's record does not indicate that he or she has successfully completed or been terminated from diversion or deferred entry of judgment pursuant to this chapter within five years prior to the alleged commission of the charged offense. [¶] (6) The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense. [¶] (b) The prosecuting attorney shall review his or her file to determine whether or not paragraphs (1) to (6), inclusive, of subdivision (a) apply to the defendant. . . . If the defendant is found eligible, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this

***(CONTINUED.)***

Thus, under the statute, "the inquiry into diversion begins with a preliminary screening for eligibility conducted by the district attorney under standards prescribed by the statute." (*People v. Superior Court (On Tai Ho), supra,* 11 Cal.3d at p. 62.) In so determining, "the district attorney need not decide what facts are material and relevant to eligibility, as the Legislature has specified them in the statute." (*Sledge v. Superior Court* (1974) 11 Cal.3d 70, 74.) Moreover, the conditions that the district attorney is to find for purposes of eligibility, like the absence of a prior drug conviction, are objective in nature. "Credibility is not an issue when the information is obtained from official records and reports. And the statute leaves no room for weighing the effect of the facts: if for example the defendant has a prior narcotics conviction, subsection (1) of subdivision (a) of the statute automatically excludes him from the program." (*Id.* at p. 74; *People v. Brackett* (1994) 25 Cal.App.4th 488, 495.)

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information available to the defendant and his or her attorney. This procedure is intended to allow the court to set the hearing for deferred entry of judgment at the arraignment. If the defendant is found ineligible for deferred entry of judgment, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney. The sole remedy of a defendant who is found ineligible for deferred entry of judgment is a postconviction appeal."

"If the district attorney determines that defendant may be eligible for diversion, the prosecutor is required to file a declaration with the court and to advise the defendant and his or her attorney of that determination in a notification which includes various statutory information. [Citations.] The case then may be referred to the probation department to investigate the defendant's suitability, and the court thereafter holds a hearing to determine, among other things, 'if the defendant should be diverted and referred for education, treatment, or rehabilitation.' [Citations.]" (*People v. Brackett, supra,* 25 Cal.App.4th at p. 494.)

In this case, the district attorney determined that defendant was *not* eligible for diversion because "the officers found pay owe sheets which indicate sales of marijuana." The district attorney reasoned that cultivation of marijuana *for sale* was not among the offenses enumerated under Penal Code section 1000 and that under subdivision (a)(3) of that statute, eligibility for diversion was conditioned on the absence of any evidence of a drug offense other than those enumerated on the eligibility list; accordingly, defendant failed to meet a condition of eligibility.

However, in *Williamson, supra,* 137 Cal.App.3d at page 423, we concluded that a finding whether marijuana cultivation was for personal use, and thus one of the enumerated offenses subject to diversion, was not subject to the district attorney's determination because "issues of credibility and the resolution

of conflicting inferences of intended use [of the marijuana], which predicate a judicial act, are at the heart of the defendant's claim of personal use."

In *Williamson*, the defendant was found with 110 marijuana plants and charged with cultivating marijuana in violation of Health and Safety Code section 11358 -- the offense at issue here. (137 Cal.App.3d at p. 420.) The prosecution declined to initiate diversion proceedings on the ground that the amount of marijuana exceeded the amount that would be cultivated for personal use. (*Ibid.*)

This court observed in *Williamson* that while in other instances Penal Code section 1000 simply refers to divertible offenses by their statutory designation, in the case of marijuana cultivation it added an additional requirement -- that the cultivation be for personal use -- this hybrid addition to the class of offenses subject to diversion having been made in 1975. (Stats. 1975, ch. 1267, § 1.) We therefore ruled: "An anomaly was thereby introduced into the criteria of diversion. The cultivation statute [citation] does not make the intended use of the cultivated marijuana an element of the offense; hence the qualifying condition must be determined independent of the pleadings. The grammar of the condition ('is for personal use') implies that what is to be determined is an operative fact. We so conclude. But the determination of an operative fact is a judicial function. [Citations.] Accordingly, we look to the statute to find a place for the exercise of this function. . . .

We conclude that the determination of the intended use of the cultivated marijuana is consigned to the trial court as a part of the diversion hearing conducted pursuant to Penal Code section 1000.2. [Fn. omitted.]" (*Williamson, supra,* 137 Cal.App.3d at p. 422.)

We also rejected in *Williamson, supra,* 137 Cal.App.3d at page 422, the People's argument "that the district attorney by virtue of subdivision (a)(3) [of Penal Code section 1000] may draw the inference that defendant possessed the marijuana plants for the purpose of sale": "Assuming that possession of immature marijuana plants may constitute possession of marijuana for sale [citation] this argument must fail. It assigns the district attorney authority to select a singular inference of intended use. But determining the operative fact of 'personal use' predicates the resolution of conflicting inferences of intended use, a judicial function. The claimed authority to determine a commercial use under subdivision (a)(3) [of Penal Code] section 1000 thus conflicts with the judicial authority to resolve conflicting inferences of intended use under section 1000.2 [of the Penal Code] since it precedes and therefore preempts, the judicial function. The judicial function must be preserved and, a fortiori, prevail." (*Williamson,* at pp. 422-423.)

As a result, in *Williamson,* this court reversed the judgment entered after the defendant had been denied a judicial determination of whether his marijuana cultivation was for

"personal use" within the meaning of Penal Code section 1000. (*Williamson, supra,* 137 Cal.App.3d at p. 423.)

The defendant in this case expressly relied on *Williamson* in seeking a judicial hearing over the prosecutor's determination that he was ineligible for diversion because his cultivation of marijuana was not for personal use. The request was denied apparently on the ground that the prosecutor had unilateral discretion to decide eligibility.

That ruling was in direct conflict with our decision in *Williamson* and therefore error. Moreover, the parties do not ask that we reexamine *Williamson* and therefore we decline to do so.

Thus, *Williamson* governs, although its reasoning has been generally held to be limited to those cases (as here) in which the defendant is charged with marijuana cultivation in violation of Health and Safety Code section 11358 -- a distinction supported by the statutory language, which gives the district attorney the right to determine the conditions set forth under subdivisions (a)(1) through (a)(6) of Penal Code section 1000, but not necessarily to determine whether the case is one of the enumerated offenses (which in the case of marijuana cultivation is qualified by the condition that it be for personal use). (*People v. Brackett, supra,* 25 Cal.App.4th at pp. 497-499; but see *People v. Paz* (1990) 217 Cal.App.3d 1209, 1217 [citing *Williamson* generally for the proposition that "[n]o hearing is

necessary unless the determination of eligibility requires resolution of factual issues"].)

For that reason, the People's reliance on cases concerning crimes other than the cultivation of marijuana is misplaced because the violations charged in those cases did not arise from the statutory "anomaly" acknowledged in *Williamson,* namely, eligibility based on a class of offense that is qualified by a factual finding (i.e., personal use). (*People v. McAlister* (1990) 225 Cal.App.3d 941, 942-943 [trial court not required to conduct pretrial hearing to determine whether cocaine possessed for personal use or sale]; *People v. Brackett, supra,* 25 Cal.App.4th at pp. 492, 497-500 ["unique situation" posed in *Williamson* does not entitle the defendant to a pretrial hearing to determine if the prosecutor properly found her ineligible for diversion for the offense of being under the influence, where there was evidence of a nondivertible offense of *possession* of a controlled substance *for sale*].)

At oral argument, the People separately contended that defendant was denied eligibility for diversion, not because the pay/owe sheets suggested that the marijuana cultivation was not for personal use (a judicial task under *Williamson*), but because they constituted evidence that defendant was guilty of the non-qualifying offense of possession of marijuana for sale -- a determination that the district attorney could presumably make under Penal Code section 1000, subdivision (a)(3). But in a case of marijuana cultivation, whether the defendant possesses

the cultivated marijuana for personal use is the mere mirror image of a finding that the defendant possessed the cultivated marijuana for sale. Making the latter determination preempts the court from making the former, which it is entitled to make under *Williamson*. Indeed, in *Williamson*, we rejected the same argument, ruling that "[t]he claimed authority [of the district attorney] to determine a commercial use [of the marijuana plants] under subdivision (a)(3) of [Penal Code] section 1000 . . . conflicts with the judicial authority to resolve conflicting inferences of intended use" of the marijuana cultivation. (*Williamson*, *supra*, 137 Cal.App.3d at p. 423.) In any event, the purpose of the district attorney's finding of evidence of a non-qualifying offense under subdivision (a)(3) of Penal Code section 1000 is to show that "defendant has probably committed narcotics offenses in addition to those listed in the statute" (*Sledge v. Superior Court*, *supra*, 11 Cal.3d at p. 75), and is thus not eligible for diversion. But this would not be the case here were the trial court to find that the cultivated marijuana was for personal use, notwithstanding the purported evidence to the contrary.

Accordingly, here, as in *Williamson*, the trial court should have performed the judicial task of determining whether defendant's charged cultivation of marijuana was "for personal use" within the meaning of Penal Code section 1000.

In such a case, the judgment must be set aside and the matter remanded to permit the trial court to exercise its

discretion to determine whether defendant should be diverted. (*Sledge v. Superior Court*, *supra*, 11 Cal.3d at pp. 75-76; *People v. Brackett, supra,* 25 Cal.App.4th at pp. 493-494.)

The People argue that if "the court's refusal to entertain further factual presentations on 'personal use' did amount to an abuse of discretion, it did not prejudice [defendant]" because defendant had been placed on probation "with terms and conditions so similar to diversion [to] make[] it clear that [defendant] suffered no prejudice in any event."

But as defendant points out, diversion has certain unique advantages, including that a plea of guilty pursuant to this statutory scheme does not constitute a conviction and that charges are dismissed, unless defendant performs unsatisfactorily during the diversion program. (Pen. Code, §§ 1000.1, 1000.3; *People v. Ormiston, supra,* 105 Cal.App.4th at p. 690 & fn. 10.)

Accordingly, the error was a miscarriage of justice (Cal. Const., art. VI, § 13) and the judgment (the order of probation) must be reversed and the matter remanded.

**III. Disqualification of the Trial Judge Is Unwarranted**

In closing, defendant asks that this matter be "remanded for further, correct proceedings before a judge other than Judge Saint[-]Evens" -- the judge who denied defendant's motion for a *Williamson* hearing. We decline his request.

Code of Civil Procedure section 170.1, subdivision (c), provides: "At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court."

But this statutory power of appellate courts to disqualify a trial court judge whose orders they have reviewed "should be used sparingly and only where the interests of justice require it." (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562.)

The only ground for disqualification of Judge Saint-Evens urged by defendant is the general statement that "a judge whose determinations have been reversed might not undertake retrial with total objectivity." In his reply, defendant concedes: "Judge Saint-Evens may not be actually biased, and [defendant] does not pretend to demonstrate that he is. [Citation.] But Judge Saint-Evens declined to reach the merits of [defendant's] *Williamson* motion upon a fundamental misunderstanding of the court's exclusive authority in this area; hence, the interests of justice indicate another judge . . . ought to hear these and any ensuing trial proceedings on remand, in order to preserve the appearance of impartiality."

This is clearly not a sufficient basis to substitute a new judge: Mere reversal of a learned trial judge's decision, particularly on an esoteric legal issue, does not and cannot warrant disqualifying the judge upon remand. "Whatever the

sting of reversal, vindictive retaliation against a successful defendant cannot be presumed to be the judicial reaction." (*People v. Gulbrandsen, supra,* 209 Cal.App.3d at pp. 1562-1563 [disqualification not warranted]; cf. *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1023-1024 [disqualification warranted because trial judge showed "unusual personal interest in handling the case," record contained unidentified evidence of "potential bias towards petitioner and towards petitioner's appointed counsel," and judge made "derogatory and apparently unfounded statements" regarding defense counsel], overruled in part on other grounds in *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1069.)

As no other bases for disqualification are urged by defendant or appear from the record, we deny his request.

**DISPOSITION**

The judgment (the order of probation) is reversed and the matter remanded to permit the trial court to exercise its discretion to determine whether defendant is eligible for the drug diversion program. If the trial court concludes that defendant is ineligible for the drug diversion program, the judgment shall be reinstated.

KOLKEY, J.

We concur:

SCOTLAND, P.J.

RAYE, J.